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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

JAMES WARFIELD et al.,
Petitioners,

vs.

H. M. MARKS et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

and

BRIEF IN SUPPORT.

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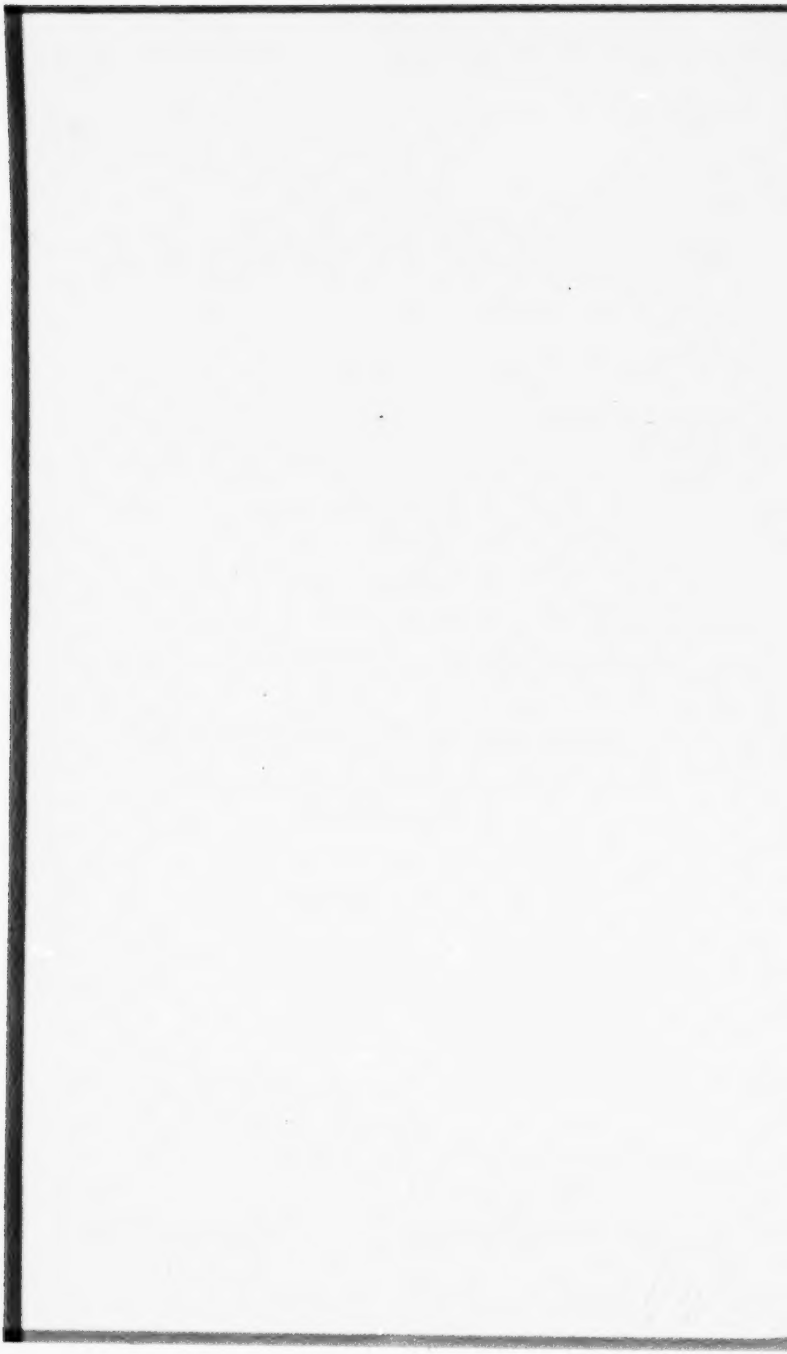

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

The jurisdiction of this court is invoked under Title 28, Section 2101 of the United States Code, effective September 1, 1948, and Rule 38 of this court.

Certified copy of the record, including the proceedings in the United States Court of Appeals for the Fifth Circuit, and the requisite number of additional copies are

filed with the petition. The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been published, but appears at pages 67 et seq. of the record.

Petitioners' complaint, filed in the Western Division of the Southern District of Mississippi, sought the cancellation of a purported Consent Decree, rendered by the Chancery Court of Adams County, Mississippi, in the cause of James Warfield, complainant, v. H. M. Marks et al., defendants, No. 11,448 in that court, dismissing, with prejudice, the original bill and other pleadings filed by petitioners in that cause and court (R. 3).

The complaint alleged that the term of the Chancery Court had ended when they learned of the entry of the Consent Decree, and sought cancellation on the following grounds:

> "The said decree, dismissing with prejudice the original and amended bills of complaint, and amendments thereto, filed in said cause, was not based upon any evidence heard or considered by said Chancery Court, but upon the purported consent of all parties to the cause.
>
> "The plaintiffs herein, including the original complainants in said cause, did not consent to the dismissal of the original and supplemental bills filed in that cause or authorize any attorney, or anyone else, to consent to the decree dismissing the original bill of complaint, and amendments thereto, with prejudice. Plaintiffs, therefore, allege that said decree is void, and should be canceled in this cause" (R. 4).

Federal jurisdiction was predicated upon diversity of citizenship and amount. Respondents moved to dismiss the complaint, on the ground that such diversity did not exist, and on the further ground that jurisdiction to cancel the decree was exclusively within the Chancery Court of Adams County, Mississippi (R. 30, 31)

The complaint showed on its face that one of the several plaintiffs, Mary Cook Smith, alleged to have approximately a 1/32 interest in the lands described in the complaint (R. 8, 9), and the defendant, Sohio Petroleum Company, were residents of the State of Ohio, and this, being prima facie sufficient to defeat federal jurisdiction, petitioners moved to amend the complaint so as to dismiss the suit against the Sohio Petroleum Company (R. 36).

The District Court overruled petitioners' motion to amend the complaint, so as to dismiss the suit against the Sohio Petroleum Company, and sustained respondents' motion to dismiss for lack of jurisdiction, on the ground that the Sohio Petroleum Company was "an indispensable party", and on the further ground that any jurisdiction to cancel the consent decree was in the Chancery Court of Adams County, Mississippi (R. 48, 49). The Court of Appeals concurred in the holding that the Sohio Petroleum Company was "an indispensable party", but restricted its affirmance to that ground, stating:

> "Our determination will be confined to the jurisdictional issue, which depends upon the indispensability of Sohio as a party litigant" (R. 68).

THE CONSENT DECREE.

So far as material the Consent Decree reads as follows:

> "This cause coming on this day to be heard on the original Bill of Complaint of James Warfield * * * and all other pleadings filed in this cause,[1] the Court being fully advised in the premises and all parties having consented thereto it is therefore ordered, adjudged and decreed:

1 The omitted provisions of the decree list the parties and the pleadings filed by them.

"First: That the Original Bill of Complaint, and the Amended and Supplemental Bill of Complaint, and the Amendments thereto be and the same hereby are dismissed with prejudice.

"Second: That the Cross-Bill of William and Samuel Warfield, the Cross-Bill of Elisha Warfield et al., and the Cross-Bill of Helen Warfield et al., be and the same hereby are dismissed with prejudice.

"Third: That a Final Record be made only of the pleadings enumerated specifically in this Final Decree, and this Final Decree itself.

"Fourth: That the costs be assessed against Defendants, Tom F. Head, James E. Kemp, Ralph R. Gilster and H. R. Burden.

"Ordered, Adjudged and Decreed this the 8th day of August, 1949.

A. W. Carter,
Chancellor."

This decree dismissed with prejudice the then pending suit of plaintiffs but did not otherwise adjudicate the rights of the Sohio Petroleum Company or any other party to the cause.

QUESTION PRESENTED.

Whether or not the Court of Appeals erred in holding that the Sohio Petroleum Company was an indispensable party.

Pertinent to this question is the following allegation in petitioners' motion to amend:

"Since the filing of the complaint herein, counsel for plaintiffs has had an opportunity to examine, and has examined the answer filed by the Sohio Petroleum Company in the cause of James Warfield, Complain-

ant, v. H. M. Marks et al., Defendants, No. 11,448, in the Chancery Court of Adams County, Mississippi.

"In Paragraph 6 of that answer, the defendant Sohio Petroleum Company denies in substance that it had either actual or constructive knowledge of any fraudulent acts on the part of its co-defendants in that suit, these being the same as its co-defendants in this case, and alleges that in making the advancement secured by its mortgages, it was 'an innocent purchaser for value.'

"Plaintiffs are not presently advised of any facts that would present a conflict with the allegations of that section of the answer of the Sohio Petroleum Company. Neither they nor any of them had any direct negotiations or dealings with that Company, and they, therefore, seek to dismiss the complaint as to it" (R. 37).

The complaint alleged that, in the event plaintiffs were mistaken as to their right to have leases executed by the defendant purchasers of the land from petitioners (or some of them), to the defendant oil companies cancelled, they were entitled to a judgment against the defendants H. M. Marks and Tom F. Head for the value of the oil and minerals removed under such leases and specifically prayed for such alternative relief (R. 28, 30).

According to the complaint, the property, in which plaintiffs therein claimed title to a 5/7ths or 27/28ths interest, consisted of 160 acres of land located in Adams County, Mississippi, on which there were seven producing oil wells, and plaintiffs were advised, after the entry of the consent decree, that they would receive, for their combined interest in and to the property involved in the litigation, approximately $10,000.00 out of a $15,000.00 consideration to be paid by the defendants for the release of all claims of the plaintiffs in and to said land, which had a value

estimated at from $5,000,000.00 to $10,000,000.00 (R. 4, 5, 11). It was further alleged that plaintiffs neither agreed to settlement on such basis nor accepted any part of the alleged consideration for the consent decree (R. 5).

The complaint, as originally filed and as sought to be amended, sought cancellation of the various deeds and leases to the defendants upon the following grounds:

(1) The purchase of the property by the defendant H. M. Marks from plaintiffs Elisha Warfield and wife, Anna Warfield, for a consideration of $8.00 an acre—its then market value, irrespective of any oil prospects, being $40.00 or $50.00 an acre, such inadequate consideration being coupled with the false representation by Marks that no one else would purchase the property because he claimed title thereto under a tax sale, void on its face and known to be invalid by Marks (R. 16, 17).

(2) Knowledge, actual or constructive, on the part of Marks, when he obtained the aforesaid deed from Elisha and Anna Warfield purporting to convey the entire interest in the property, that they only had a right to sell a one-fourth interest in and to the same; that plaintiffs James Warfield, William Warfield and their brother, Samuel Warfield, owning in excess of a one-half interest in the property, had conveyed it to Elisha and Anna Warfield in order that Elisha Warfield, then residing in Cape Girardeau, Missouri, might mortgage it to secure his indebtedness to the Security National Bank, of Cairo, Illinois; that, instead of executing a mortgage to the bank, Elisha and Anna Warfield executed a deed to it, absolute on its face but executed and accepted as a mortgage to secure Elisha Warfield's debt of approximately $1200.00; that when this debt matured, Elisha Warfield was notified by the bank that the property would have to be sold and was requested to go to Natchez, Mississippi, and make a sale thereof;

that defendant Marks had previously sought to buy the property and Elisha Warfield agreed to sell to him for the consideration aforesaid; that Elisha Warfield was instructed by Marks to execute a deed to his property upon his return home and to have the Security National Bank send the deed, with draft attached for the purchase price, to a Natchez bank, that when the deed was received by the bank an examination of the records disclosed that title to the property was in the Security National Bank and not in Elisha and Anna Warfield; that thereafter the Security National Bank executed a quit claim deed to Elisha and Anna Warfield and, following the execution of the quit claim deed, they conveyed the property to Marks; that no notice was given to any of the plaintiffs, except Elisha Warfield, of the negotiations and none of them, except Elisha, received any part of the consideration for the sale; and that the quit claim deed from the bank to Anna and Elisha Warfield, dated October 30, 1939, was recorded on the same date as the deed, dated November 10, 1939, from Anna and Elisha Warfield to the defendant Marks (R. 16-20).

(3) The deed from Anna and Elisha Warfield to Marks conveyed the entire property but they only had record title to approximately a three-fourths interest in and to the same. Thereafter defendants, through false and fraudulent representations, obtained conveyances from plaintiffs to the remaining one-fourth interest in the property. The defendant, Tom F. Head, obtained two conveyances of valuable interests for a consideration of $100.00 each by representing that the property was without value, that he only wanted it to clear up some business he was handling and that no oil had been discovered on or near the property. When he made these representations it was in a proven oil field, oil had been discovered thereon and additional wells were being drilled (R. 14, 15).

Agents of the Humble Oil Company obtained from Mary Cook Smith, a resident of Ohio, having no knowledge of the value of the property, a lease worth thousands of dollars for a consideration of $100.00 by representing that the property had little or no value, that the closest oil well to the property was more than 40 miles distant and at the time these representations were made and relied upon by Mary Cook Smith, the property was in a proven oil field and oil wells were being drilled thereon (R. 25). Other interests were obtained by defendants through similar false and fraudulent representations (R. 26).

(4) In obtaining all the conveyances, leases, and agreements involved in this proceeding, defendants, white men with large business experience, over-reached plaintiffs, who are colored people, with limited education and business experience, some of them being barely able to read and write, and easy victims of designing men, seeking to defraud them of valuable property rights.

II.

REASONS WHY THE WRIT SHOULD BE GRANTED.

(1) Sohio Petroleum Company Was Not an Indispensable Party.

In holding that it was, the Court of Appeals for the 5th Circuit disregarded applicable decisions of this Court and numerous Federal decisions which hold that the test as to whether an omitted party is indispensable is whether the adjudication of the case would necessarily result in injustice to the absent party and if the relief prayed, or some of it, can be fairly granted to the plaintiff without injustice to the absent party, then the latter is not indispensable. **Bourdieu v. Pacific Western Oil Company**, 299 U. S.

65, 70, 71, 81 L. Ed. 42, 45; **Payne v. Hook**, 74 U. S. 425, 19 L. Ed. 260; **Williams v. Crabb**, 7th Cir., 117 F. 193; **Mathis v. Hemingway**, 8th Cir., 24 F. 2d 951; **Rose v. Saunders**, 9th Cir., 69 F. 2d 339-343; **State of Washington v. United States**, 9th Cir., 87 F. 2d 421; **Edward B. Marks Music Corp. v. Jerry Vogel Music Co.**, 2nd Cir., 140 F. 2d 268, 269; **MacBride v. Burnett**, 41 F. Supp. 661, 663, 664; **Barron & Holtzoff on Federal Practices and Procedure**, Rules Edition, Vol. II, Sec. 512, pp. 58-60; Sec. 513, pp. 62-63.

In the application of the foregoing rule, a Court of Equity will exercise diligence in seeking a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in. **Bourdieu v. Pacific Western Oil Company**, supra, thus states the rule:

> "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. West v. Randall (C. C.), 2 Mason 181, 196, Fed. Cas. No. 17,424 (opinion by Mr. Justice Story); Cole Silver Min. Co. v. Virginia & G. H. Water Co. (C. C.), 1 Sawy. 685, 699, Fed. Cas. No. 2,990 (opinion by Mr. Justice Field); Story, Eq. Pl., 8th ed. # # 77, 96. And see Russell v. Clark, 7 Cranch. 69, 98, 3 L. Ed. 271, 281; Elmendorf v. Taylor, 10 Wheat. 152, 167, 168, 6 L. ed. 298, 294; Cf. Equity Rule 39.
>
> "We refer to the rule established by these authorities because it illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in. * * *"

In reaching the conclusion that the Sohio was an indispensable party, the District Judge and the Court of Ap-

peals overlooked the alternative relief sought by plaintiffs. They not only sought the cancellation of the Consent Decree but in case such relief could not be granted with respect to the "defendant Oil Companies," they asked a money judgment against the defendants, H. M. Marks and Tom F. Head, in the approximate amount of One Million Dollars (R. 28). Obviously, the Sohio Petroleum Company had no interest in and was not an indispenable party to that feature of the litigation. Irrespective, however, of that phase of the case, the Sohio Petroleum Company is not an indispensable party to the litigation. As pointed out in plaintiffs' motion to amend (R. 36, 37), a final decree can be made in this cause without affecting the interest of the Sohio Petroleum Company or without leaving the controversy in such condition that its final determination would be inconsistent with equity and good conscience. That Company plead in the Chancery Court case that it was "an innocent purchaser for value" (R. 37). Plaintiffs in the instant case do not challenge, but in substance concede, that contention.

In that situation, the court could protect the rights of the Sohio Petroleum Company under its mortgage by requiring a formal disclaimer on the part of plaintiffs of any intention to interfere with that mortgage, or the rights of the Sohio Petroleum Company under its provisions. Such a procedure was approved by the Court of Appeals for the 5th Circuit in Hudson v. Newell, 174 F. 2d 546.

It, therefore, seems clear of doubt that the decision of the Court of Appeals is in conflict with applicable decisions of this Court.

The importance of the question relating to indispensable parties is one of substance that brings petitioners' application for a Writ of Certiorari within the scope of Rule 38 of this Court.

(2). **Federal Rules Governing Amendment Should Be Liberally Construed to Preserve the Jurisdiction of the Court.**

Rules 15 (a), 20 and 21 of the Federal Rules of Civil Procedure, governing amendments, joinder of parties and adding or dropping of parties, should be liberally construed to permit amendments and to preserve the jurisdiction of the Court. **Bourdieu v. Pacific Western Oil Company**, 299 U. S. 65, 70, 81 L. Ed. 42, 45; **Downey v. Palmer**, 2nd Cir., 114 F. 2d 116; **United States v. Koike**, 9th Cir., 164 F. 2d 155, 157; **Mitchell v. Wright**, 5th Cir., 154 F. 2d 924, 926; **Keene Lumber Co. v. Leventhal**, 1st Cir., 165 F. 2d 817; **Weaver et al. v. Marcus et al.**, 4th Cir., 165 F. 2d 862; **Kapp v. Kerr & Co.**, D. C. Mich., 2 F. R. D. 509; **Norton v. United Gas Corp.**, D. C. La., 1 F. R. D. 155.

This was not done by the Court of Appeals. In refusing to allow plaintiffs to amend the complaint so as to eliminate the Sohio Petroleum Company as a party defendant the Trial Court disregarded the rule of liberal construction herein stated and the Court of Appeals refused to apply corrective processes to such action.

In its opinion, the Court of Appeals said:

> "This means that the question of indispensable parties in the federal courts is often inherent in the issue of federal jurisdiction; but that where the controversy may be determined without prejudice to the rights of absent parties who are beyond the court's jurisdiction, or whose presence would defeat federal jurisdiction, it will be done; and it is said that a court of equity will strain hard to reach that result; but here there is no question of an absent party beyond this court's jurisdiction, and it does not clearly appear that the controversy may be determined without prejudice to the rights of the party who is sought to

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be eliminated by the amendment. In this case, the party is in court, and there is no reason for a court of equity to strain hard to find a way to adjudicate the merits of a controversy in the absence of a party which is not only within the jurisdiction of the court, but which has been made a defendant by the plaintiffs; which has come in and plead, and objects to being eliminated if the case is to be heard on its merits. A consent judgment is often regarded as an instrument contractual in nature and entitled to protection, the same as a contract, where rescission is concerned. Since fraud vitiates everything it touches, it would be impossible to cancel this judgment on the ground of fraud as to everyone except the Sohio Petroleum Company, and leave it intact as to said company. No decree can be entered in accordance with the prayer of the complaint without annulling the vested rights that were created by the entry of the judgment. Whatever rights were acquired by virtue of the judgment, when it became final, vested in praesenti" (R. 69, 70).

Referring to the Sohio Petroleum Company, the Court of Appeals said "the party is in court, and there is no reason for a court of equity to strain hard to find a way to adjudicate the merits of a controversy in the absence of a party which is not only within the jurisdiction of the court, but which has been made a defendant by the plaintiffs." The statement there made is destitute of any sound legal basis and affords no justification for a violation of the established equitable principle that the court should exercise diligence and "strain hard to adjudicate the merits of the case in the absence of interested parties that cannot be brought in." **Bourdieu v. Pacific Western Oil Company**, supra.

If the original bill was not maintainable because one of the defendants and one of the plaintiffs were citizens of

the same state, the jurisdictional defect could have been removed by a dismissal of the bill as to that defendant, unless it was an indispensable party. **Connolly v. Taylor,** 2 Pet. 556, 7 L. Ed. 518; **Grove v. Grove** (C. C.), 93 F. 865.

To cure a jurisdictional defect by amendment was not only permitted prior to the adoption of the Federal Rules of Civil Procedure but comes well within the construction and application of these rules as sanctioned by this Court.

(3) **All Parties to a Suit in Which a Consent Decree Is Entered Are Not Necessarily Indispensable Parties in a Proceeding to Set Aside That Decree.**

It is true, as stated by the Court of Appeals, that "a Consent Judgment is often regarded as an instrument contractual in nature," but this does not require that a party to that suit must be joined in an action to set aside the decree unless such proceeding would affect his interest and particularly where making him a party would defeat the jurisdiction of the Court.

The complaint in the instant case, as sought to be amended, concedes the rights of the Sohio Petroleum Company as claimed by its answer in the Chancery proceeding (R. 37). If this did not estop plaintiffs from thereafter attacking or in any way interfering with the mortgage of the Sohio Petroleum Company, the Court, in its decree in the instant case, could impose conditions that would fully protect such rights, including the requirement that plaintiffs enter a formal disclaimer of any intention to interfere with the Sohio mortgage. **Hudson v. Newell,** supra; **Cather v. Ocean Accident & Guarantee Corp.,** 94 F. Supp. 511, 519.

The Court, to afford such protection, may require that the bill be dismissed as to absent parties and may so frame its decree as to do justice to the parties without

prejudice to such absent persons. **Waterman v. Canal-Louisiana Bank & Trust Co.**, 215 U. S. 33, 48.

It is the general rule that all parties to an instrument must be joined in a suit for its cancellation, but the rule is not without exception, and if the absent party has no interest whatever in the subject matter of the suit or if his rights can be protected by decree, he need not be joined. **Chance v. Buxton**, 5th Cir., 163 F. 2d 989; **Texas Co. v. Wall**, 7th Cir., 107 F. 2d 45, 50; **Texas & Pacific R. Co. v. Brotherhood of Railroad Trainmen**, 60 F. Supp. 263, 267, 268; **Cather v. Ocean Accident & Guarantee Corp.**, supra.

In the instant case, granting the relief sought, under appropriate limitations, would leave the Sohio Petroleum Company legally free to protect its interest under the mortgage as against both the original mortgagor and the plaintiffs in this case.

In **Texas Co. v. Wall**, 107 F. 2d 45, 50, the Court of Appeals for the Seventh Circuit had under consideration the contention that a suit instituted by a lessee without making the lessor a party should be dismissed for lack of an indispensable party, and the Court said:

> "One is not an indispensable party to a suit merely because he has a substantial interest in the subject matter of the litigation, nor is one an indispensable party even though one's interest in the subject matter of the litigation is such that his presence as a party to the suit is required for a complete adjudication in that suit of all questions related to the litigation. The test as suggested in Waterman v. Canal-Louisiana Bank & Trust Co. may be stated thus: Is the absent person's interest in the subject matter of the litigation such that no decree can be entered in the case which will do justice between the parties actually

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before the court without injuriously affecting the rights of such absent person?

"On the pleadings and facts of this case the District Court properly could enter, and did enter, a decree which did justice between the parties actually before the court without injuriously affecting the rights of the absent plaintiff-lessor.

"In our opinion the plaintiff's lessor was not an indispensable party and we so hold."

On the point under consideration Texas Company v. Wall was cited with approval in Texas & Pacific R. Co. v. Brotherhood of Railroad Trainmen, 60 F. Supp. 263, a suit where some of the parties to an agreement were not made parties to the suit, and to a similar situation in Cather v. Ocean & Accident Guarantee Co., supra.

The only benefit conferred upon the Sohio Petroleum Company by the consent decree was protection against further litigation involving the validity of its mortgage, and this benefit can be preserved and fully protected in the instant case. Upon what theory, then, can it be reasonably held that the Sohio Petroleum Company is an indispensable party in determining the rights of plaintiffs against defendants other than the Sohio in the Chancery case?

In reaching its conclusion that the Sohio Petroleum Company, because a party to the original suit, was an indispensable party in the present action, the Court of Appeals apparently disregarded the established federal rules with respect to preserving jurisdiction and determining the case on the merits as declared by this court in Waterman v. Canal-Louisiana Bank & Tr. Co., 215 U. S. 33, 48, 54 L. Ed. 80, as follows:

" 'There is another class of persons whose relations to the suit are such that, if their interest and their

absence are formally brought to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case; but, if this cannot be done, it will proceed to administer such relief as may be in its power between the parties before it. And there is a third class whose interest in the subject matter of the suit and in the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot be subjected to its jurisdiction.'

"The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of such absent party. 1 Street, Fed. Eq. Pr. #519.

"If the court can do justice to the parties before it without injuring absent persons, it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons. Payne v. Hook, 7 Wall. 425, 19 L. ed. 260."[2]

(4) The Court of Appeals Should Have Reversed the Holding of the Trial Judge That a Federal Court, by Reason of Comity, Was Precluded From Setting Aside the Purported Consent Decree Entered in the Chancery Court.

Where a consent decree is entered, jurisdiction is based upon consent (**Swift & Co. v. United States**, 276 U. S. 311), and the lack of authority of an attorney to consent to a

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2 See Hughes, Federal Practice, Vol. 18, Sec. 21242, and cases cited in note 6 to the text.

compromise judgment can be shown in either a direct or collateral attack and a decree entered without such authority may be set aside in an appropriate proceeding. **Holker v. Parker,** 7 Cranch. 436, 3 L. Ed. 396; **United States v. Beebe,** 180 U. S. 343, 45 L. Ed. 563; **West v. Bank of Commerce & Trust Co.** (4th Cir.), 167 F. 2d 664, 666; **DeLong v. Owsley's Ex'x** (Ky.), 213 S. W. 2d 806; **Dwight v. Hazlett,** 107 W. Va. 192, 147 S. E. 877, 66 A. L. R. 102; **Hirsch Bros. & Co. v. Kennington Co.,** 155 Miss. 242, 124 So. 344, 88 A. L. R. 1.

In the so-called consent decree, plaintiffs' suit was dismissed with prejudice, thus barring any further action by them on the matters involved in the suit. Such a dismissal constituted a retraxit, and an attorney has no implied or apparent authority to take such action but can do so only where he has been specially authorized by his client. **United States v. Parker,** 120 U. S. 89; **Bertelsen v. White** (D. C. Mass.), 58 F. 2d 792, 795; **7 C. J. S.,** Sec. 87, p. 909.

The consent decree being void, the District Court had jurisdiction to set aside the consent decree on the grounds alleged in the complaint and should have exercised that jurisdiction. **Marshall v. Holmes,** 141 U. S. 589, 596, 35 L. Ed. 870; **Robb v. Vos,** 155 U. S. 13, 38, 39 L. Ed. 52; **Bank v. Stevens,** 169 U. S. 432, 436, 42 L. Ed. 807; **Arrowsmith v. Gleason,** 129 U. S. 86, 109, 32 L. Ed. 630; **Cooper v. Newell,** 173 U. S. 555; **Commonwealth Trust Co. v. Bradford,** 297 U. S. 613, 619; **Meredith v. City of Winterhaven,** 320 U. S. 228, 231, 234, 235.

In determining the jurisdiction of the District Court it is immaterial that the Mississippi Chancery Court may have had jurisdiction to impeach the purported consent decree. The availability of such a remedy in a state court is not a bar to obtaining relief in a federal court. **Atlas Life Insurance Co. v. Southern,** 306 U. S. 563.

The original suit in the Chancery Court was not a proceeding in rem or quasi-rem. That court did not have possession of or exercise control over the property involved. The suit was an action in personam. **Commonwealth Trust Co. v. Bradford,** 297 U. S. 613, 619. Therefore, pendency of the chancery suit, if revived by the cancellation of the consent decree, would not preclude the filing of a suit for cancellation by plaintiffs, based on diversity of citizenship, in the federal court. **Kline v. Burke Construction Co.,** 260 U. S. 230.

An inquiry by a federal court as to the existence of an essential jurisdictional fact—consent of the parties—upon which the Chancery Court of Adams County predicated its judgment, would not, in any way, interfere with proceedings in that court and, therefore, no question of comity is involved.

However, rules of comity or convenience must give way to statutory or constitutional rights of the citizen. **Meredith v. City of Winterhaven,** 320 U. S. 228, 231, 234, 235, 88 L. Ed. 9; **Oklahoma Gas Co. v. Russell,** 261 U. S. 290, 293, 67 L. Ed. 659; **Lydick v. Fischer** (5th Cir.), 135 F. 2d 983; **Carpenter Steel Co. v. Metropolitan-Edison Co.,** 268 F. 980, 982.

The Mississippi proceedings had ended when plaintiffs invoked the jurisdiction of the Federal court to set aside the purported consent decree and, on the ground of diversity of citizenship, they had a plain right thus to invoke such jurisdiction. To deny them that right is to disregard the decisions of this Court. **Commonwealth Trust Company v. Bradford** and **Meredith v. City of Winterhaven,** supra.

PRAYER.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals for the Fifth Judicial Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case entitled on its docket No. 13,536, James Warfield et al., Appellants and Cross Appellees, v. H. M. Marks et al., Appellees and Cross Appellants, to the end that said case may be reviewed and determined by this Court as provided by the judicial code (U. S. C. A., Title 28, Sec. 2101), and that the judgment of the Court of Appeals for the Fifth Circuit be reversed by this Honorable Court, and that petitioners may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

L. E. GWINN,
Attorney for Petitioners.

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

JAMES WARFIELD et al.,
Petitioners,

vs.

H. M. MARKS et al.,
Respondents.

BRIEF AND ARGUMENT

In Support of Petition for Writ of Certiorari.

I.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, Section 2101 of the United States Code, effective September 1, 1948, and Rule 38 of this Court.

II.

OPINIONS.

The opinion of the Court of Appeals appears at pages 67 et seq., and of the District Court at pages 48, 49 of the record.

III.

SPECIFICATIONS OF ERROR.

(1) The Court of Appeals erred in holding that the Sohio Petroleum Company was an indispensable party and that, therefore, there was no federal jurisdiction of the suit. (R. 68, 70).

(2) The Court of Appeals erred in affirming the judgment of the trial court denying plaintiffs' motion to amend (R. 50, 70).

(3) The Court of Appeals erred in holding that all parties to a suit which is terminated by a consent decree are indispensable parties in a proceeding to set it aside (R. 69, 70).

(4) The Court of Appeals erred in failing and refusing to apply corrective processes to the holding of the District Court that, on the ground of comity, plaintiffs should be required to institute any proceedings to set aside the consent decree, if void, in the Chancery Court that rendered it (R. 49, 58).

IV.

THE FACTS.

The facts have been recounted in sufficient detail in the petition.

Respondents' Motion for a Summary Judgment was denied by the District Court. Having determined that there was no federal jurisdiction of the suit, the Court of Appeals held that it would not be proper to deal with the Motion for a Summary Judgment (R. 71).

Certain affidavits and exhibits, including the record in the Chancery Court, were filed in the District Court on the motion for a Summary Judgment. By stipulation, these were not printed as a part of the record, but the exhibits were filed with the Court of Appeals (R. 59-61).

As the Motion for a Summary Judgment is not involved in this proceeding, it will not be necessary for the Court, in determining the issues, to consider the exhibits filed with the record in the Court of Appeals.

V.

ARGUMENT.

The Specifications of Error are substantially the same as the reasons assigned in the petition for the granting of a Writ of Certiorari and, in view of the discussion of these reasons in the petition, we do not consider it necessary to make an extended argument in support of any of the Specifications of Error.

As construed by us, the opinion of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the supervisory powers of this Court. That court sanctioned the refusal of the trial court to allow an amendment eliminating the Sohio Petroleum Company as a party defendant.

As the result of such action, the Sohio Petroleum Company remained a party defendant to the proceeding, and on the ground that there was "no question of an absent party beyond this court's jurisdiction" the Court of Appeals held that there was no reason for a "court of equity to strain hard to find a way to adjudge the merits of a controversy in the absence of a party," etc. (R. 69), but the trial court was in error in refusing the amendment. In Levering & Garrigues Co. et al. v. Morrin et al., 2nd Cir., 61 F. 2d 115, 121, the Court said:

> "If the party improperly joined is not indispensable, the jurisdictional defect may be cured by a motion in the trial court to amend and dismiss as to him. Horn v. Lockhart, 17 Wall. 570, 21 L. Ed. 657 * * *."

And in the same case the Court further says:

> "An appellate court must reverse for want of jurisdiction, but may give leave to the trial court to per-

> mit correction by amendment of the pleadings. Halsted v. Buster, 119 U. S. 341, 7 S. Ct. 276, 30 L. Ed. 462 * * *."

If the Sohio Petroleum Company was not an indispensable party, dismissal as to that defendant would have preserved the jurisdiction of the Court. City of Orangeburg v. Southern Ry. Co., 4th Cir., 134 F. 2d 890, 894; Cohn v. Columbia Pictures Corp., D. C. N. Y. 1949, 9 F. R. D. 204. If, thereafter, the Sohio Petroleum Company apprehended that the decree herein might affect its rights, or if it preferred that these be adjudicated in the proceedings, it could have intervened and such intervention would not have destroyed the jurisdiction of the Court. Wichita Railroad & L. Co. v. Public Utilities Commission of the State of Kansas, 260 U. S. 48, 54; Ford et al. v. Adkins et al., 39 F. Supp. 472, 473.

In reaching its conclusion, we think it obvious that the Court of Appeals overlooked or disregarded certain material allegations in the proposed amendment to the complaint, which would have precluded petitioners from obtaining any relief against the Sohio Petroleum Company. These allegations, undisputed in the record, are as follows:

> "In paragraph 6 of that answer, the defendant Sohio Petroleum Company denies in substance that it had either actual or constructive knowledge of any fraudulent acts on the part of its co-defendants in that suit, these being the same as its co-defendants in this case, and alleges that in making the advancement secured by its mortgages, it was 'an innocent purchaser for value'.
>
> "Plaintiffs are not presently advised of any facts that would present a conflict with the allegations of said section of the answer of the Sohio Petroleum Company. Neither they, nor any of them, had any direct negotiations or dealings with that Company,

and they, therefore, seek to dismiss the complaint as to it" (R. 37).

Recognizing that some of the defendant oil companies, holding leases or mortgages, might be innocent purchasers for value, and that, therefore, no relief could be obtained against them, the complaint alleged that in that event plaintiffs would be entitled to a personal judgment against the defendants, H. M. Marks and Tom F. Head, for $1,000,000.00, the value of oil and minerals removed under such leases, and they prayed for a decree against these two defendants for the value of the oil and minerals removed from the leased premises (R. 28, 30).

Manifestly, the Sohio Petroleum Company had no interest in any personal judgment plaintiffs might have obtained against the defendants Marks and Head.

Considering the above matters, and bearing in mind the established rule that a court of equity will exercise diligence to seek a way to adjudicate the merits of the case in the absence of interested parties that cannot be brought before the Court (**Bourdieu v. Pacific Western Oil Company**, 299 U. S. 65, 70), and the equally well settled rule that if the "relief prayed, **or some of it**, can be fairly granted to the plaintiff without injustice to the absent party, then the latter is not indispensable." (**MacBryde v. Burnett**, 41 F. Supp. 661, 663, 664, and authorities there cited), it necessarily follows that the Court of Appeals was in error in holding that the Sohio Petroleum Company was an indispensable party.

The Court of Appeals, in its opinion, emphasizes the fact that the complaint, as originally filed, made the Sohio Petroleum Company a party-defendant. That is beside the point. It is the status of that defendant, not its inadvertent joinder in a plea, later sought to be corrected, that determines its indispensability.

Treating the consent decree as an "instrument contractual in nature and entitled to protection the same as a contract" (R. 69), does not establish that the Sohio Petroleum Company is an indispensable party in this proceeding, nor does the fact that it might have a substantial interest in that decree, unless that interest is one that may not be separated from those of the other defendants. We think that these contentions are conclusively established by **Waterman v. Canal-Louisiana Bank & Trust Company**, 215 U. S. 33; **Texas Co. v. Wall**, 7th Cir., 107 F. 2d 45; **Ford et al. v. Adkins et al.**, 39 F. Supp. 472, 473; **Texas & Pacific R. Co. v. Brotherhood of Railroad Trainmen**, 60 F. Supp. 263, 368; **Cather v. Ocean Accident & Guaranty Corp.**, 94 F. Supp. 511, 516.

In Waterman v. Canal-Louisiana Bank & Trust Company, 215 U. S. 33, 30 S. Ct. 10, 14, 54 L. Ed. 80, the court said:

> "If the court can do justice to the parties before it without injuring absent persons, it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. * * * the court may * * * generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons (Citing Payne v. Hook, 7 Wall 425, 19 L. Ed. 260)."

In Texas Co. v. Wall et al. (7th Cir.), 107 F. 2d 45, at page 50, the Circuit Court of Appeals said:

> "One is not an indispensable party to a suit merely because he has a substantial interest in the subject matter of the litigation, nor is one an indispensable party even though one's interest in the subject matter of the litigation is such that his presence as a party to the suit is required for a complete adjudication in that suit of all questions related to the litigation. The test as suggested in Waterman v. Canal-Louisiana

Bank & Trust Co. (supra) may be stated thus: Is the absent person's interest in the subject matter of the litigation such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of such absent person?"

Defendants' motion to dismiss the complaint (R. 30, 31), renewed after plaintiffs had moved the Court to be allowed to dismiss the complaint against the Sohio Petroleum Company (R. 36, 41), admitted the facts alleged in the complaint and plaintiffs' motion to amend.

The proposed amendment (R. 31) states the contention of the Sohio Petroleum Company, made in the Chancery Court, that it was an innocent purchaser for value, and, in effect, concedes that contention (R. 31).

The facts thus alleged in the complaint and the proposed amendment were undisputed in the record.

These factual allegations clearly state a case within the scope of the rule pronounced by this Court in Waterman v. Canal-Louisiana Bank & Trust Company, 215 U. S. 33, and the Court of Appeals should have followed that rule in its decision in this case.

There is nothing in the pleadings herein with respect to the Sohio Petroleum Company that even suggests that any determination of the rights of the parties who would be actually before the Court if the case was dismissed as to the Sohio would result in an injustice to that company.

The complaint herein is replete with specific allegations of gross and unconscionable frauds; the perpetrators of these frauds were shrewd traders and experienced business men. The victims were uneducated, inexperienced ne-

groes who, as a result of the oppression, fraud and deceit practiced upon them, were deprived of valuable property for little or no consideration.

In order to obtain redress of the wrongs they suffered petitioners invoked the jurisdiction of a Federal Court, and it is respectfully submitted that the case stated in the complaint should be heard on its merits.

Respectfully submitted,

L. E. GWINN,
Attorney for Petitioners.

FILED
NOV 13 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

NO. 369

JAMES WARFIELD, ET AL,

Petitioners,

VS.

H. M. MARKS, ET AL,

Respondents.

RESPONSE OF H. M. MARKS, ET AL, TO
PETITION FOR WRIT OF CERTIORARI

P. H. EAGER, JR.,
M. M. ROBERTS,
S. B. LAUB,
FRANK E. EVERETT, JR,
Of Attorneys for Respondents.

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IN THE

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No. 369

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RESPONSE OF H. M. MARKS ET AL TO PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully represents and shows to the Court:

I.

OBJECTIONS TO SUFFICIENCY OF PETITION AND RECORD FOR WRIT OF CERTIORARI

1. The petition does not conform to the requirements of Rule 38.

(a) Under said rule, a petition for review on writ of certiorari shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed. This cause is incompletely filed in that Respondent-Defendants' Motion for Summary Judgment is omitted as well as all record of Respondent-Defendants' Cross-Appeal thereon.

(b) The petition does not assign "special and important reasons" for writ of certiorari as required by Rule 38(5).

(c) There is a fatal absence of conflict of decisions of the Circuit Court of Appeals with decisions of other like courts, and no important question of federal law is involved, and there is a total absence of substantial federal question or case of gravity and importance, to justify granting petition.

II.

RESPONSE PROPER TO PETITION FOR WRIT OF CERTIORARI

While the Petition contains many inaccurate statements of fact, Respondents content themselves with the excellent, concise and clear review of the controlling facts all as set forth in the opinion of the 5th Circuit Court of Appeals. The ample and direct citation of authorities contained in said opinion constitute a complete answer to the arguments of Petitioner.

CONCLUSION

For the reasons set out in the foregoing, the Petition should be denied.

Respectfully submitted,

P. H. EAGER, JR.,
M. M. ROBERTS,
S. B. LAUB,

FRANK E. EVERETT, JR.,
Of Attorneys for Appellee.

CERTIFICATE

I, Frank E. Everett, Jr., one of the Attorneys for the Respondent, hereby certify that I have this day mailed to the Honorable L. E. Gwinn, 725 Columbian Mutual Tower, Memphis, Tennessee, Attorney for Petitioner, a true copy of the foregoing Brief.

This the 5th day of November, 1951

FRANK E. EVERETT, JR.,
Of Attorneys for Respondent.

The undersigned, L. E. Gwinn, 725 Columbian Mutual Tower, Memphis, Tennessee, Attorney for Petitioner, hereby acknowledges receipt of typewritten copy of the foregoing Brief, on this the 5th day of November, A. D., 1951.

L. E. GWINN,
Attorney for Petitioner.

FILED
NOV 16 1951

SUPREME COURT OF THE UNITED STATES

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No. 369

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Respondents

PETITIONERS' REPLY BRIEF

Petitioners respectfully state and show to the Court:

I

Respondents' Objections to Sufficiency of Record Invalid

Respondents contention, 1(a) of their brief, that the petition does not conform to the requirements of Rule 38 in that the certified transcript of the record is incomplete, should be rejected for these reasons:

(1) The *complete* printed record, as filed in the Court of Appeals, supplemented by the proceedings in that Court, was certified as required by Rule 38. The matters not included in the printed record were omitted therefrom by stipulation of the parties (R. 59-61) and Respondents are now estopped from complaining of their omission.

(2) The matters omitted from the printed record were filed as exhibits, supporting or opposing Respondents' motion for a summary judgment. This motion was denied by the District Court (R. 62). Respondents' cross-appeal was restricted to that denial (R. 52). The Court of Appeals did not pass upon that question. Respondents did not ask a re-hearing nor seek a review of such action by this Court. Therefore, to have printed these exhibits for use in this Court would have violated the spirit, if not the letter, of Rule 10, sub-section 2, and Rule 38, sub-section 8. Moreover, Rule 38, Section 7, provides that it shall not be necessary to *re-print* the record where it has been *printed* for use of the Court below.

II

Omitted Matters Immaterial

As conceived by Petitioners, the holding of the Court of Appeals that all parties to a suit in which a consent decree is entered are indispensable parties in a proceeding to set aside that decree and the processes of reasoning by which that conclusion was reached, are in conflict with the decisions of this Court in *Buordieu* v. *Pacific Western Oil Company,* 229 U. S. 65, 70, 71, and *Waterman* v. *Canal-Louisiana Bank & Trust Company,* 215 U. S. 33, 48.[1]

Considering actualities, the Court of Appeals, in refusing to apply corrective processes to the holding of the District Court that Petitioners must seek relief in the State Court rendering the decree, from any fraud perpetrated upon them by Respondents, sanctioned the practical abandonment of its jurisdiction by the Federal District Court in a case in which that jurisdiction had been properly invoked, and in so doing, rendered a decision in conflict with the decisions of

[1] The question of who are indispensable parties in setting aside a consent decree has not been precisely determined by this Court.

this Court in *Commonwealth Trust Company* v. *Bradford*, 297 U. S. 213, 219, and *Meredith* v. *City of Winterhaven*, 320 U. S. 228, 231, 234, 235.

If correct in these conclusions, the petition presented a case within the scope of Rule 38 governing petitions for certiorari, and, in stating these questions, it was not necessary to use the precise language of that Rule.

Respectfully submitted,

L. E. Gwinn,
725 Columbian Mutual Tower,
Memphis, Tennessee,
Attorney for Petitioners